

Affirmation of Jason Habinsky

Exhibit

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
PHILIP FEI, on behalf of
himself and classes of
those similarly situated,

Plaintiffs,

vs.

No. 07 Civ. 8785

WEST LB AG,

Defendant.

-----X

DEPOSITION OF VIVIAN J. YOST

New York, New York

Thursday, May 15, 2008

Reported by:

SHAUNA STOLTZ-LAURIE

CSR NO. 810490

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2 Q. Okay. And is this the list of the
3 staff members that you had mentioned a few
4 moments ago?

5 A. Yes.

6 Q. And is this the list of all the
7 individuals -- all the executives that you
8 were collecting job descriptions for?

9 A. Yes.

10 Q. Okay. And you mentioned another
11 one of your job duties as a consultant at
12 West LB was FLISA (ph.) work?

13 A. Excuse me?

14 Q. Was FLISA (ph.), was FLSA work?

15 A. Oh, okay. I've never heard it
16 pronounced that way.

17 Q. We lawyers get in the habit of
18 doing that.

19 A. Okay.

20 Q. So what FLSA work did you have at
21 West LB?

22 A. I tested the individuals that were
23 in the executive job category for exemption
24 status.

25 Q. And are those individuals the ones

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2 instructions on how to conduct exemption
3 testing?

4 A. No.

5 Q. And so did you conduct it based on
6 your own knowledge and experience --

7 A. Yes.

8 Q. -- in this area?

9 And about how long did it take you
10 to conduct the exemption testing of the
11 executives?

12 A. I don't remember, but it was not a
13 quick process. It was lengthy.

14 Q. And what, if anything, did anyone
15 from West LB give you to conduct the
16 exemption testing? And I mean what
17 information or what documents.

18 A. Anyone from West LB?

19 Q. Yes.

20 A. Well, the Human Resource -- not the
21 Human Resources. Excuse me. The managers
22 gave me job descriptions that I had either
23 asked for or helped them have their staff
24 members create.

25 Q. Apart from the job descriptions,

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2 descriptions, the salaries and the official
3 job titles, to conduct this exemption
4 testing?

5 A. I reviewed the job description to
6 see if I understood the general scope and
7 responsibility of the individual, and then I
8 went back -- well, no, I take that back. I
9 reviewed the job description, and inevitably
10 I would have questions about the duties, and
11 I would go back to the manager and/or the
12 employee to ask specific questions about
13 their duties to make sure that I understood
14 their duties so that I could perform an
15 exemption test.

16 Q. Okay, and which executives did you
17 go back to?

18 A. I don't remember. I would always
19 have a conversation with the manager about
20 the group of executives that reported to
21 them, but I don't remember what executives I
22 spoke to in addition to their manager.

23 Q. Okay, and what did you do next?

24 A. If I felt that I understood
25 clearly, after having the conversation with

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2 the manager, this individual's duties and
3 responsibilities, then I would -- I had
4 pulled out the Federal Register that had the
5 latest rule -- the latest descriptions of the
6 -- all of the exemption categories, of which
7 there were five, and I would review those
8 against the job description and my notes from
9 the manager on that job description and those
10 individual's duties, and determine if that
11 individual qualified for an exemption.

12 Then I had a computer program I
13 used -- I think it was called the Overtime
14 Exemption Expert, or something like that --
15 and I would then plug -- answer questions in
16 that program to see if that program came up
17 with the same determination that I came up
18 with. And I don't ever remember with it
19 coming up with a determination that was
20 contrary to my determination. And I printed
21 out from that Overtime Exemption Expert
22 program whether they qualified for an
23 exemption or not, and I attached that to the
24 job description and made that part of my
25 documentation trail. I mainly used that

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2 Overtime Exemption Expert for documentation
3 and to confirm my determination.

4 Q. And then what did you do next?

5 A. I marked the job description exempt
6 or nonexempt, and compiled all of that data
7 into spread sheets, determining who was
8 currently exempt and needed to be moved to
9 nonexempt, who did not qualify for an
10 exemption, who could remain exempt, did
11 qualify for an exemption, and I don't
12 remember if there were any other categories
13 there in between. Individuals that were
14 currently nonexempt that could be moved to
15 exempt, that would be another category. I
16 think there were three categories.

17 Q. Okay. Did you create any other
18 documents, other than that spread sheet that
19 you're describing, after you completed the
20 exemption testing?

21 A. I don't remember.

22 Q. Okay. Did you ever complete and
23 draft any PowerPoint presentations regarding
24 the work that you did?

25 A. I don't remember.

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2 talked to people and you interviewed
3 individuals, but I just want to know, looking
4 at this job description alone, could you
5 reach a determination on whether this person
6 should be classified as exempt or nonexempt?

7 A. No.

8 MR. HABINSKY: Objection.

9 Sorry.

10 Q. Is there any way you can reach a
11 determination based on this document alone?

12 A. I would need to -- because it's not
13 the document that's exempt or not or not
14 exempt, it's the person, I would need to know
15 the person, understand how the person
16 performed these duties, to make the
17 determination.

18 Q. Okay. Is there any way someone
19 could perform these duties, setting aside the
20 salary questions, but they could perform
21 these duties that would result in them being
22 classified as exempt?

23 A. Are you -- I'm not sure I
24 understand what you're asking me.

25 Q. Okay, let me rephrase it then.

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2 hiring, terminations and performance
3 reviews."

4 Q. So you can?

5 A. Yeah.

6 Q. Okay. Can you determine based on
7 this job description alone whether this
8 person should be classified as exempt or
9 nonexempt?

10 A. No.

11 Q. Okay. You would need to talk to
12 the person or their manager?

13 A. Right.

14 I just want to add one thing.

15 Q. Sure.

16 A. I also at times spoke to the Human
17 Resources representative for that department
18 who had intimate knowledge of the duties and
19 responsibilities of the individuals.

20 Q. Was that as part of your exemption
21 testing?

22 A. At times it would be.

23 Q. Did you also do that when you were
24 working on the job descriptions project?

25 A. I don't remember.